IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 42

WCC No. 2010-2598

GINGER DOSTAL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

ORDER GRANTING PETITIONER'S REQUEST FOR PENALTY AND ATTORNEY FEES

Summary: After a trial of the issues, the Court determined that the UEF was unreasonable in adjusting Petitioner's claim. The Court bifurcated the issue of whether the UEF could be held liable for attorney fees and a penalty, pursuant to §§ 39-71-611 and -2907, MCA, respectively.

Held: Under the statutes applicable in the present case, the UEF may be found liable for attorney fees and a penalty. Since I have adjudged the UEF's adjusting to be unreasonable in the present case, I conclude Petitioner is entitled to her attorney fees and a penalty against the UEF.

¶ 1 The trial in this matter occurred on April 25-26, 2011, in Great Falls, Montana. Petitioner Ginger Dostal was present and was represented by J. Kim Schulke. Leanora O. Coles represented Respondent Uninsured Employers' Fund (UEF). Bernadette Rice, claims examiner for the UEF, was also present.

¶ 2 Pertinent to this Order, after hearing the evidence presented at trial, I concluded that the UEF had been unreasonable in its handling of Dostal's claim and issued findings of fact and conclusions of law accordingly.[1] In subsequent orders granting reconsideration of those findings and conclusions, I further held that the UEF had

---

[1] *Dostal v. Uninsured Employers' Fund*, 2012 MTWCC 5, ¶ 62.

unreasonably refused to pay certain impairment ratings,[2] and had unreasonably refused to reimburse Dostal for certain travel expenses.[3]

¶ 3 In the Pretrial Order, the parties raised the issue of whether Dostal could recover attorney fees and a penalty against the UEF.[4] I ordered the parties to participate in post-trial oral argument on the issue. Having considered the parties' oral arguments as well as the evidence previously presented to the Court, I have concluded that Dostal is entitled to her attorney fees and a penalty against the UEF, pursuant to §§ 39-71-611 and -2907, MCA, respectively, for the reasons set forth below.

¶ 4 On May 24, 1993, Dostal suffered an industrial injury to her left and right ankles and her back when she fell off a roof while performing her job duties as a roofer for Randy Crowley Construction in Harlowton, Montana.[5] Dostal's employer was uninsured at the time of her industrial injury and therefore the UEF administers her claim.[6]

¶ 5 This case is governed by the 1991 version of the Workers' Compensation Act since that was the law in effect at the time of Dostal's industrial accident.[7]

¶ 6 Under § 39-71-611(1), MCA:

> The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:
>
> (a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
>
> (b) the claim is later adjudged compensable by the workers' compensation court; and
>
> (c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

And under § 39-71-2907(1), MCA:

> The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

---

[2] 2012 MTWCC 40.

[3] 2012 MTWCC 41.

[4] Pretrial Order at 9.

[5] *Dostal*, 2012 MTWCC 5, ¶ 5.

[6] *Id.*, ¶ 6.

[7] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

¶ 7 The UEF asserts that it is not subject to a penalty and attorney fees because these statutes apply only to insurers, and the UEF is not an insurer. The UEF relies upon *Thayer v. Uninsured Employers' Fund*[8] and *Pekus v. Uninsured Employers' Fund*[9] to support its position.

¶ 8 In *Thayer*, the widow of a worker who died as the result of an industrial injury disputed the UEF's entitlement to a setoff of her benefits after she obtained a judgment against the uninsured employer. She further argued that § 39-71-511, MCA – the statute which enabled the UEF to claim an offset – was unconstitutional. This Court found against the petitioner and, pertinent to the present case, stated:

> The UEF is not an insurer in the usual sense. It is State funded and State operated. It receives no premiums, it writes no policies. Rather, it is a safety net for workers whose employers fail to comply with the law requiring that they provide workers' compensation insurance coverage for their employees. But it is a limited safety net, limited to the funds it secures through statutory penalties and collections . . . .[10]

¶ 9 On appeal, the Montana Supreme Court upheld this Court's decision. Pertinent to the present case, it distinguished other cases from *Thayer* on the grounds that the UEF is not an insurer and was not paid premiums by the insured to assume the risk of loss. The court explained:

> The [Uninsured Employers'] Fund is a legislatively provided source from which to minimize the hardships imposed when an injured worker is unable to get workers' compensation benefits as a result of the employer's failure to provide coverage. Furthermore, the statutes which create the Fund specifically provide that claimants to the Fund are not guaranteed full payment of benefits provided in the act. . . .

---

[8] 1999 MT 304, 297 Mont. 179, 991 P.2d 447.

[9] 2003 MTWCC 33.

[10] *Thayer v. Uninsured Employers' Fund*, 1998 MTWCC 77, ¶ 24.

> Moreover, the statutory scheme of the Uninsured Employers' Fund requires that we treat the Fund differently than an insurer. Payments from the Fund are dependent upon the Fund's ability to pay claims. . . .
>
> . . . .
>
> Because the Fund is merely a safety net and stands in the place of the employer, we conclude that it is reasonable to condition the Fund's obligations on the extent to which the employer fails to provide compensation. . . .[11]

¶ 10 In *Pekus*, this Court held:

> Consistent with *Thayer*, I find [§§ 39-71-611, -612, and -2907, MCA (2001),] inapplicable to the UEF. This conclusion follows both from the Supreme Court's holding that the UEF is not an "insurer" within the meaning of the [WCA] and from the underlying premise of *Thayer*, that the Fund is a safety net.[12]

¶ 11 Dostal argues that her case is distinguishable from *Thayer* and that this Court applied the *Thayer* decision overbroadly when it held in *Pekus* that the UEF could not be subject to a penalty or attorney fees under the WCA. Dostal further argues that her case is distinguishable from *Pekus* because of intervening changes in § 39-71-116, MCA. The version applicable to Dostal's claim, which went into effect on July 1, 1992, states:

> (10) "Insurer" means an employer bound by compensation plan No. 1, an insurance company transacting business under compensation plan No. 2, the state fund under compensation plan No. 3, ***or the uninsured employers' fund provided for in part 5 of this chapter***. (Emphasis added.)

¶ 12 The definition of "insurer" under § 39-71-116, MCA, was amended in 1993 and removed the reference to the UEF. During oral argument, Dostal's counsel stated that the legislative history is silent as to why the legislature made this particular change to the WCA. She argued that under § 1-2-101, MCA, I am obligated to ascertain and declare what is in terms or substance contained within a statute, and neither to insert what has been omitted nor omit what has been inserted. Dostal argues that in the present instance, since the applicable version of § 39-71-116(10), MCA, states that the

---

[11] *Thayer*, 1999 MT 304, ¶¶ 21-22, 24.

[12] *Pekus*, ¶ 4.

UEF is an "insurer" for purposes of the WCA, I must hold consistent with the statute and therefore conclude that statutory provisions within the 1991 WCA which apply to other statutorily-defined "insurers" apply equally to the UEF.

¶ 13 As for *Pekus* and *Thayer*, Dostal argues that *Pekus* is inapplicable to her case because it applies a later version of the WCA in which the UEF was no longer part of the definition of "insurer" under § 39-71-116, MCA. I agree with Dostal regarding *Pekus*: the case is distinguishable from Dostal's case because under the applicable statute in *Pekus*, the UEF was no longer included in the definition of "insurer" under § 39-71-116, MCA.

¶ 14 If *Thayer* did not exist, it would be abundantly clear that the UEF can be held liable for attorney fees and a penalty under the 1991 statutes because at that time, the WCA included the UEF in its definition of insurer. *Thayer*, however, applied the 1991 statutes – the same version applicable to Dostal's case. In *Thayer*, the Supreme Court did not specifically discuss § 39-71-116(10), MCA. Because the court is silent regarding this statute, it is not readily apparent whether the court was unaware of the inclusion of the UEF within the definition of "insurer" or whether the court believed the specific facts of *Thayer* made the statute's definition of "insurer" inapplicable in that instance.

¶ 15 In *Thayer*, the Supreme Court needed to determine whether the UEF could essentially claim a subrogation interest via § 39-71-511, MCA. The court found its previous subrogation cases inapplicable to the UEF's situation. It explained:

> [T]he Fund is not an insurer and has not been paid premiums by . . . the uninsured employer[] to assume the risk of any loss. . . .
>
> Moreover, the statutory scheme of the Uninsured Employers' Fund requires that we treat the Fund differently than an insurer. Payments from the Fund are dependent upon the Fund's ability to pay claims. . . . The setoff provisions contained in § 39-71-511, MCA, are uniquely necessary to assure some payment to as many uninsured employees as possible.
>
> . . . The Fund merely stands in the place of the uninsured employer, to provide some basis for recovery where the employer is impecunious.
>
> Because the Fund is merely a safety net and stands in the place of the employer, we conclude that it is reasonable to condition the Fund's

obligations on the extent to which the employer fails to provide compensation.[13]

¶ 16 If this matter involved a subrogation claim under § 39-71-511, MCA, the UEF's argument that *Thayer* controlled would be well taken. However, although the Supreme Court concluded in *Thayer* that the UEF was not an insurer for purposes of its ability to act under § 39-71-511, MCA, *Thayer* did not overrule the legislature by judicial fiat. In the 1991 version of the WCA, the legislature explicitly included the UEF within the statutory definition of "insurer." The 1991 statutes further provide that an "insurer" is subject to payment of attorney fees and a penalty when it unreasonably denies or delays the payment of benefits. If I were to expand the ruling of *Thayer* beyond its application to § 39-71-511, MCA, I would be acting in direct contravention of the express provisions of the remainder of the 1991 WCA. It is not this Court's prerogative to overrule the legislature.

JUDGMENT

¶ 17 Petitioner is entitled to her costs and attorney fees.

¶ 18 Petitioner is entitled to a 20% penalty.

¶ 19 Petitioner shall have 10 days from the date of this Judgment to submit a verified statement of costs and attorney fees.

¶ 20 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 15th day of November, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: J. Kim Schulke
Leanora O. Coles
Submitted: March 6, 2012

[13] *Thayer*, 1999 MT 304, ¶¶ 21-24.